

MEMORANDUM

To: Honorable Mark Pocan

From: Matthew C. Weed, Specialist in Foreign Policy Legislation, mweed@crs.loc.gov, 7-4589

Subject: **Application of the War Powers Resolution to U.S. Military Operations in Yemen and Current Congressional Disapproval Resolutions**

This memorandum¹ responds to your request for information and analysis on U.S. military operations related to the joint counter-Houthi campaign being conducted by armed forces of the Kingdom of Saudi Arabia (“Saudi Arabia,” or KSA) and the United Arab Emirates (UAE) in Yemen, and specified issues related to congressional legislative action taken pursuant to provisions of the War Powers Resolution (WPR; P.L. 93-148; 50 U.S.C. §§ 1541-48), as well as a related provision, Section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (P.L. 98-164; 50 U.S.C. § 1546a).

Selected War Powers Resolution Issues Related to Yemen Resolutions

Inadvertent Authorization of Counterterrorism Operations in Yemen

Both current Yemen disapproval resolutions, H.Con.Res. 138 and S.J.Res. 54, require the removal of U.S. armed forces from hostilities in Yemen, but except certain U.S. armed forces engaged in counterterrorism operations in that country. S.J.Res. 54 states that the removal directive does not apply to “United States Armed Forces engaged in operations directed at al Qaeda or associated forces,” while H.Con.Res. 138 excepts “United States Armed Forces engaged in operations authorized under the 2001 Authorization for Use of Military Force.” The language in both resolutions serves to indicate that the removal directive is limited to the subject of the two resolutions, that is to say, ending the U.S. involvement in the KSA-led counter-Houthi campaign in Yemen. Although there is nothing in the language that specifically authorizes the activities of U.S. armed forces engaged in counterterrorism operations in Yemen, some have expressed concern that the language in each resolution could inadvertently serve as congressional approval of the executive branch’s reliance on 2001 AUMF authority to use military force in Yemen. Since the first years after the 2001 AUMF was enacted, many Members of Congress have opposed executive branch interpretations of the 2001 AUMF that they find overly expansive, serving as the basis of the use of military force in multiple countries possibly not originally contemplated as theatres of combat under the 2001 AUMF as originally conceived, including Yemen.

It seems clear that neither resolution contains language that could serve as a new, standalone authorization of U.S. military counterterrorism operations in Yemen. Section 8(a) of the WPR states that authority to

¹ Information included in this memorandum may be used in other CRS products.

introduce armed forces is not to be inferred from any provision of law or treaty unless such law, or legislation implementing such treaty, specifically authorizes the introduction of armed forces into hostilities or potential hostilities, and states that it is “intended to constitute specific statutory authorization within the meaning of this joint resolution.”

H.Con.Res. 138 references other existing authority, the 2001 AUMF, as forming the basis for the exception to the withdrawal directive. In addition, neither resolution’s language contains any indication of legislative judgment as to whether such U.S. use of military force for counterterrorism purposes in Yemen is congressionally authorized. It seems likely that if Congress were to take up disapproval of U.S. military counterterrorism operations in Yemen, it would not need to repeal the language in these two resolutions in order to do so. On the other hand, the executive branch is likely to rely on any legislative action Congress takes that can be treated as approval or even neutral acknowledgement of the executive branch’s interpretation of 2001 AUMF to argue against any challenge to military operations in Yemen and other countries where the executive asserts 2001 AUMF authority.

Debate of Constitutionality of a Section 5(c) Concurrent Resolution

Section 5(c) creates a process by which Congress can direct termination of an unauthorized presidential use of military force through concurrent resolution, adopted in both houses of Congress but not presented to the President for signature. It has been argued that this provision constitutes an unconstitutional “legislative veto,” essentially a legislative action that is intended to have the effect of enacted law but without the step of presentment to the President. In invalidating an unrelated statute as constituting a “legislative veto,” the Supreme Court in *INS v. Chadha*² determined that all “legislative acts” are subject to the bicameralism and presentment requirements of Article I, §7.³ The Court defined a legislative act as any action “properly [] regarded as legislative in its character and effect” or taken with “the purpose and effect of altering the legal rights, duties and relations of persons...outside the Legislative Branch.” The courts have not ruled expressly on the constitutionality of Section 5(c). However, courts have followed *Chadha* to strike down provisions in law that allow disapproval of executive branch action by simple resolution in one house or concurrent resolution in both houses without presentment. The courts have not ruled expressly on the constitutionality of Section 5(c). The U.S. Supreme Court in *INS v. Chadha*, as well as other courts in other cases, however, have struck down provisions in law that allow disapproval of executive branch action by simple resolution in one house or concurrent resolution in both houses without presentment.⁴

These cases, however, involve instances of congressional reversal of executive agency decisions by a simple or concurrent resolution, when such decisions were taken pursuant to a previous congressional delegation of authority to such agency by legislation. In *Chadha*, for instance, federal law permitted the Attorney General to make decisions about the deportation of foreign persons, but included a provision allowing Congress to reverse those decisions by concurrent resolution. Because such a reversal would have legislative effect, that is, it would partially repeal or carve out exceptions to existing executive agency authority in law, any such reversal, repeal, or carve-out must also be enacted into law through adoption by both houses of Congress and presidential approval (or presentment and subsequent enactment over presidential veto).

In the case of a Section 5(c) concurrent resolution under the WPR, it could be argued that Congress’s action in adopting a concurrent resolution directing withdrawal from unauthorized hostilities is not a legislative act to repeal or carve out from existing authority previously delegated by Congress. Congress

² *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

³ *Id.* at 952.

⁴ For additional information, see R41989, *Congressional Authority to Limit Military Operations*, by Jennifer Elsea, Michael Garcia, and Thomas Nicola.

in the WPR has not purported to delegate use of military force decision making authority to the President, setting a legislative veto to reverse such decisions when it sees fit. Nor has it delegated authority to the President to order any specified use of military force. Instead, it can be argued that Congress is indicating its will to formally disapprove an originally unauthorized use of military force, which arguably would not alter the legal rights or duties of the President. Such a resolution would act to reiterate Congress's position, stated in Section 2 of the WPR, that the Constitution grants only Congress, not the President, the authority to introduce U.S. armed forces into hostilities in all cases except defense against an armed attack on the United States, its possessions, or U.S. armed forces.⁵

A concurrent resolution evidencing the will of Congress to direct the President to withdraw from hostilities that the WPR asserts is already unauthorized may nonetheless have less than the desired effect, as it is in one conception merely a reiteration of congressional interpretation of the limits of presidential war powers, an interpretation already rejected in most instances by the President. Congress enacted Section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (P.L. 98-164; 50 U.S.C. § 1546a), discussed above, to provide a separate process by which Congress could expedite consideration of a joint resolution that would require presentment to the President rather than using an expedited Section 5(c) resolution. Utilization of this provision might be preferred by some Members of Congress, as it avoids the legislative veto issue, and perhaps provides a more forceful vehicle by which to require an end to unauthorized presidential introduction of U.S. armed forces into hostilities.

Possible Precedent Set by Bicameral Adoption of a Yemen Resolution

Were either Yemen disapproval resolution to be adopted by both houses, it would mark the first instance of bicameral congressional disapproval of presidential use of military force since adoption of the WPR in 1973. While a number of such resolutions (all save one being concurrent resolutions introduced in the House) have been considered over the years, three have passed the House, and none have passed the Senate. Congress has enacted legislation that repealed previously granted authority for the use of military force, repealing declarations of war and authorizations for use of military force, setting automatic terminations for such authorities, and prohibiting the use of funds for continuation of the use of military force. Although some of these situations involved significant contention between Congress and the President, in the final calculation these legislative actions have been taken after negotiated agreement with the executive branch that they would occur. In this way, adoption by Congress of one of the Yemen resolutions would seem to represent a rebuke of unilateral executive action that might be argued to be on par with the enactment into law of the WPR itself.

Some argue that adoption of the resolution would result in Congress adding an additional step that it would have to take in all future cases of unauthorized presidential uses of military force, instead of letting the WPR self-execute by operation of the 60-day limit in Section 5(b). Congress's strong position when a President uses unauthorized military force for over 60 days, it is asserted, will be weakened if Congress's action to disapprove is considered a necessary first step before a use of military force is considered unauthorized in the future.⁶

In future instances, Congress declining to take similar action to an adoption of a Section 5(c) concurrent resolution in the Yemen case could be argued to mean tacit congressional approval of unauthorized presidential uses of military force. From the operation of the provisions of the WPR, both as constructed and in actual practice, however, it is not clear that such utilization of a Section 5(c) resolution poses a substantial additional concern for the effective exercise of congressional war powers. First, from a

⁵ The assertion of the delineation of constitutional war powers between the President and Congress in Section 2 of the WPR and elsewhere in the Resolution also raises constitutional questions. These questions are not taken up in this memorandum.

⁶ See, e.g., Letter arguing that Members should oppose H.Con.Res. 138, from Faiz Shakir, National Political Director, and Christopher Anders, Deputy Director, American Civil Liberties Union, November 14, 2018.

practical standpoint, congressionally unauthorized presidential uses of military force have occurred consistently, both before and after the enactment of the WPR, and have continued for more than 60 days, arguably in violation of Section 2(c) and 5(b) of the WPR and the war powers provisions of the Constitution. It seems difficult to argue that Congress's ongoing reluctance to utilize Section 5(c) resolutions has somehow until now ensured greater compliance with Sections 2(c) or 5(b), or otherwise preserved its constitutional war powers and checked presidential overreach in this area. In addition, it may be argued that Section 5(c) was drafted in a way that presumes presidential noncompliance with Section 5(b). Section 5(c) states that Congress can use a concurrent resolution *at any time* to direct withdrawal from hostilities, not only within the 60-day period.

Also, it seems clear that the WPR creates two processes for Congress to indicate a required termination of unauthorized hostilities: allowing 60 days to elapse without congressional authorization, or actively disapproving such hostilities through a Section 5(c) resolution. Section 5(c) and 5(b) do not contradict each other and are complementary; they also do not require operation in tandem for either to be effective. To argue that utilization of a Section 5(c) resolution will create a new requirement that the Section 5(c) process in all cases seemingly reads the separate 60-day termination requirement out of existence.

Additionally, it seems that the WPR's provisions, read together, state that neither the 60-day period for termination in Section 5(b) nor termination through concurrent resolution in Section 5(c) have any bearing on the unauthorized nature of the use of military force under the WPR. Whether Congress takes action under Section 5(c), or allows the 60-day period to expire, the WPR asserts that a given introduction of U.S. armed forces into hostilities is unauthorized at all times after such use of force begins unless and until Congress has acted to specifically authorize it. No inaction during the 60-day period set out in Section 5(b), or utilization of 5(c) measures, would seem to change the onus on the President to avoid unauthorized introduction of U.S. armed forces into hostilities. Applying the language of Section 2(c) setting out limits on presidential authority to engage forces in hostilities, it can be argued that adoption of a Section 5(c) measure merely expresses Congress's decision that it will not retroactively cure a President's already unauthorized action.